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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KING COUNTY, a Washington municipal
11 corporation,

12 Plaintiff,

13 v.

14 ACE AMERICAN INSURANCE
15 COMPANY,

16 Defendant.

Case No. C18-1886 RSM

**MODEL STIPULATED
PROTECTIVE ORDER AND ORDER
REGARDING "CLAWBACK" OF
INADVERTENTLY PRODUCED
DOCUMENTS**

17 Pursuant to Federal Rule of Civil Procedure 26 and Federal Rule of Evidence 502, and in
18 the interest of efficiency and judicial economy, particularly in the interest of avoiding ancillary
19 litigation over discovery issues related to confidential or proprietary information or the
20 inadvertent production of privileged materials, Plaintiff King County and Defendant ACE
21 American Insurance Company (ACE) hereby stipulate and agree to this order and the procedures
22 set forth herein for designating and protection confidential or proprietary information and for
23 addressing the inadvertent production of Protected Material as herein defined.

CONFIDENTIALITY

24 1. **PURPOSES AND LIMITATIONS**

25 Discovery in this action is likely to involve production of confidential, proprietary, or
26 private information for which special protection may be warranted. Accordingly, the parties
27

MODEL STIPULATED PROTECTIVE ORDER - 1
CASE NO. 2:18-CV-01886 RSM

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1 hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The
2 parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket
3 protection on all disclosures or responses to discovery, the protection it affords from public
4 disclosure and use extends only to the limited information or items that are entitled to confidential
5 treatment under the applicable legal principles, and it does not presumptively entitle parties to
6 file confidential information under seal.

7 2. “CONFIDENTIAL” MATERIAL

8 “Confidential” material shall include the following documents and tangible things
9 produced or otherwise exchanged, provided that such documents and tangible things are not
10 already in the public domain at the time of production or delivery through no prior or future
11 unauthorized act of the recipient party:

- 12 a) personal identifying information relating to any individual;
- 13 b) confidential escrowed bid documents from Walsh Construction Company or other
14 construction companies submitting bids for the South Magnolia CSA Control
15 Project Conveyance Pipeline HDD Option Contract No. C00823C13;
- 16 c) confidential proprietary business information received by ACE as part of the
17 underwriting process; and
- 18 d) Documents from third parties received pursuant to a subpoena or through a release
19 in connection with this litigation and the items above.

20 3. SCOPE

21 The protections conferred by this agreement cover not only confidential material (as
22 defined above), but also (1) any information copied or extracted from confidential material; (2)
23 all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
24 conversations, or presentations by parties or their counsel that might reveal confidential material.
25 However, the protections conferred by this agreement do not cover information that is in the
26 public domain or becomes part of the public domain through trial or otherwise.

27 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

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1 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
2 or produced by another party or by a non-party in connection with this case only for prosecuting,
3 defending, or attempting to settle this litigation. Confidential material may be disclosed only to
4 the categories of persons and under the conditions described in this agreement. Confidential
5 material must be stored and maintained by a receiving party at a location and in a secure manner
6 that ensures that access is limited to the persons authorized under this agreement.

7 4.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
8 ordered by the court or permitted in writing by the designating party, a receiving party may
9 disclose any confidential material only to:

10 (a) the receiving party's counsel of record in this action, as well as employees
11 of counsel to whom it is reasonably necessary to disclose the information for this litigation;

12 (b) the officers, directors, and employees (including in house counsel) of the
13 receiving party to whom disclosure is reasonably necessary for this litigation, unless the parties
14 agree that a particular document or material produced is for Attorney's Eyes Only and is so
15 designated;

16 (c) experts and consultants to whom disclosure is reasonably necessary for
17 this litigation and who have signed the "Acknowledgment and Agreement to Be Bound"
18 (Exhibit A);

19 (d) the court, court personnel, and court reporters and their staff;

20 (e) copy or imaging services retained by counsel to assist in the duplication
21 of confidential material, provided that counsel for the party retaining the copy or imaging service
22 instructs the service not to disclose any confidential material to third parties and to immediately
23 return all originals and copies of any confidential material;

24 (f) during their depositions, witnesses in the action to whom disclosure is
25 reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound"
26 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
27 transcribed deposition testimony or exhibits to depositions that reveal confidential material must

1 be separately bound by the court reporter and may not be disclosed to anyone except as permitted
2 under this agreement;

3 (g) the author or recipient of a document containing the information or a
4 custodian or other person who otherwise possessed or knew the information.

5 4.3 Filing Confidential Material. Before filing confidential material or discussing or
6 referencing such material in court filings, the filing party shall confer with the designating party,
7 in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating party will
8 remove the confidential designation, whether the document can be redacted, or whether a motion
9 to seal or stipulation and proposed order is warranted. During the meet and confer process, the
10 designating party must identify the basis for sealing the specific confidential information at issue,
11 and the filing party shall include this basis in its motion to seal, along with any objection to
12 sealing the information at issue. Local Civil Rule 5(g) sets forth the procedures that must be
13 followed and the standards that will be applied when a party seeks permission from the court to
14 file material under seal. A party who seeks to maintain the confidentiality of its information must
15 satisfy the requirements of Local Civil Rule 5(g)(3)(B), even if it is not the party filing the motion
16 to seal. Failure to satisfy this requirement will result in the motion to seal being denied, in
17 accordance with the strong presumption of public access to the Court's files.

18 5. DESIGNATING PROTECTED MATERIAL

19 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
20 or non-party that designates information or items for protection under this agreement must take
21 care to limit any such designation to specific material that qualifies under the appropriate
22 standards. The designating party must designate for protection only those parts of material,
23 documents, items, or oral or written communications that qualify, so that other portions of the
24 material, documents, items, or communications for which protection is not warranted are not
25 swept unjustifiably within the ambit of this agreement.

26 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
27 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to

unnecessarily encumber or delay the case development process or to impose unnecessary expenses and burdens on other parties) expose the designating party to sanctions.

If it comes to a designating party's attention that information or items that it designated for protection do not qualify for protection, the designating party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this agreement (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, disclosure or discovery material that qualifies for protection under this agreement must be clearly so designated before or when the material is disclosed or produced.

(a) Information in documentary form: (e.g., paper or electronic documents and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that contains confidential material. If only a portion or portions of the material on a page qualifies for protection, the producing party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

(b) Testimony given in deposition or in other pretrial proceedings: the parties and any participating non-parties must identify on the record, during the deposition or other pretrial proceeding, all protected testimony, without prejudice to their right to so designate other testimony after reviewing the transcript. Any party or non-party may, within fifteen days after receiving the transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or exhibits thereto, as confidential. If a party or non-party desires to protect confidential information at trial, the issue should be addressed during the pre-trial conference.

(c) Other tangible items: the producing party must affix in a prominent place on the exterior of the container or containers in which the information or item is stored the word "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection, the producing party, to the extent practicable, shall identify the protected portion(s).

1 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
2 designate qualified information or items does not, standing alone, waive the designating party's
3 right to secure protection under this agreement for such material. Upon timely correction of a
4 designation, the receiving party must make reasonable efforts to ensure that the material is treated
5 in accordance with the provisions of this agreement.

6 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

7 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
8 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality
9 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
10 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
11 challenge a confidentiality designation by electing not to mount a challenge promptly after the
12 original designation is disclosed.

13 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
14 regarding confidential designations without court involvement. Any motion regarding
15 confidential designations or for a protective order must include a certification, in the motion or
16 in a declaration or affidavit, that the movant has engaged in a good faith meet and confer
17 conference with other affected parties in an effort to resolve the dispute without court action. The
18 certification must list the date, manner, and participants to the conference. A good faith effort to
19 confer requires a face-to-face meeting or a telephone conference.

20 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
21 intervention, the designating party may file and serve a motion to retain confidentiality under
22 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
23 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
24 made for an improper purpose (e.g., to harass or impose unnecessary expenses and burdens on
25 other parties) may expose the challenging party to sanctions. All parties shall continue to
26 maintain the material in question as confidential until the court rules on the challenge.

1 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
2 LITIGATION

3 If a party is served with a subpoena or a court order issued in other litigation that compels
4 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that party
5 must:

6 (a) promptly notify the designating party in writing and include a copy of the
7 subpoena or court order;

8 (b) promptly notify in writing the party who caused the subpoena or order to
9 issue in the other litigation that some or all of the material covered by the subpoena or order is
10 subject to this agreement. Such notification shall include a copy of this agreement; and

11 (c) cooperate with respect to all reasonable procedures sought to be pursued
12 by the designating party whose confidential material may be affected.

13 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

14 If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential
15 material to any person or in any circumstance not authorized under this agreement, the receiving
16 party must immediately (a) notify in writing the designating party of the unauthorized
17 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material,
18 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of
19 this agreement, and (d) request that such person or persons execute the “Acknowledgment and
20 Agreement to Be Bound” that is attached hereto as Exhibit A.

21 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
22 MATERIAL

23 When a producing party gives notice to receiving parties that certain inadvertently produced
24 material is subject to a claim of privilege or other protection, the obligations of the receiving
25 parties are those set forth below and in Federal Rule of Civil Procedure 26(b)(5)(B). This
26 provision is not intended to modify whatever procedure may be established in an e-discovery
27

1 order or agreement that provides for production without prior privilege review. The parties agree
2 to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

3 10. NON TERMINATION AND RETURN OF DOCUMENTS

4 Within 60 days after the termination of this action, including all appeals, each receiving
5 party must undertake all reasonable efforts to return all confidential material to the producing
6 party, including all copies, extracts and summaries thereof. Alternatively, the parties may agree
7 upon appropriate methods of destruction.

8 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
9 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
10 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
11 work product, even if such materials contain confidential material.

12 The confidentiality obligations imposed by this agreement shall remain in effect until a
13 designating party agrees otherwise in writing or a court orders otherwise.

14
15 **CLAWBACK PROCEDURE
INADVERTENT PRODUCTION**

16 11. The production of documents by the parties and non-parties that produce
17 documents in this matter (collectively, the “Producing Party”) shall be governed by Federal Rule
18 of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502 regarding the inadvertent
19 production of material protected by the attorney-client privilege, the work product doctrine, or
20 any other privilege or protection from disclosure recognized under applicable law (“Privileged
21 Material”).

22 12. The procedure set forth below is intended to reduce the time and expense of an
23 initial review for privilege (including any privilege or protection from disclosure recognized
24 under applicable law) and work product protection by providing the Producing Party or any other
25 party purporting to hold a privilege, with an efficient method for retrieving or “clawing back”
26 inadvertently produced Privileged Material, subject to any resolution of any dispute over the
27 privileged or protected status of the Privileged Material, and for foreclosing any arguments of
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1 waiver, subject to the procedures outlined below, for bringing disputed claims to the Court for
2 resolution.

3 13. If a Producing Party, or any other party purporting to hold a privilege, has a good
4 faith belief that Privileged Material has been inadvertently produced, it shall promptly notify the
5 receiving parties of its claim of privilege or protection. In connection with this provision, the
6 parties shall comply with their ethical and legal obligations concerning the actual or apparent
7 inadvertent production of Privileged Material, including their obligation to promptly notify the
8 Producing Party in appropriate circumstances.

9 14. Upon receipt of any notice claiming that a document is or includes Privileged
10 Material, all other parties (regardless of whether they agree with the claim of privilege or work-
11 product protection) shall promptly:

12 (a) use reasonable efforts to destroy or sequester all copies of the inadvertently
13 produced documents or material in their possession, custody, or control, and notify the
14 Producing Party, or any other party purporting to hold a privilege, that they have done so;

15 (b) notify the Producing Party that they have taken reasonable steps to retrieve and
16 destroy or sequester the inadvertently produced documents or material from other
17 persons, if any, to whom such documents or material have been provided, consistent with
18 Rule 26(b)(5)(B).

19 15. To the extent a receiving party disputes the claim of privilege or work-product
20 protection (the “Disputing Party”), the Disputing Party shall notify the Producing Party, or any
21 other party purporting to hold a privilege, of its position (the “Dispute Notification”). Within
22 seven (7) days of receiving the Dispute Notification, the Producing Party, or any other party
23 purporting to hold a privilege, shall either withdraw its claim of privilege or confer with the
24 Disputing Party in an effort to resolve their disagreement. If the disagreement is not resolved,
25 the Producing Party, or any other party purporting to hold a privilege, and the Disputing Party
26 shall cooperate in presenting the dispute to the Court through the expedited procedure set forth
27 in Local Rule 37(a)(1)(B). The Producing Party, or other party purporting to hold a privilege,

1 shall provide the Disputing Party with its draft of the joint statement contemplated by Local Rule
2 37(a)(1)(B)(i) within seven (7) days of the conclusion of the parties' conference, unless otherwise
3 specifically agreed to by the parties in writing. In arguing issues concerning an asserted
4 protection for Privileged Material, no party shall claim a waiver by reason of the inadvertent
5 production in this action.

6 16. Pursuant to Fed. R. Evid. 502(d), the inadvertent production of Privileged
7 Material in this proceeding shall not constitute a waiver of any applicable privilege, protection,
8 or prohibition from disclosure of that Privileged Material in any other federal or state proceeding.

9 17. If, during a deposition, a party claims that a document being used in the deposition
10 (e.g., marked as an exhibit, shown to the witness, or made the subject of examination) is subject
11 to privilege or work-product protection, it may at its sole election (a) allow the document to be
12 used in the deposition without waiver of its claim of privilege or work-product protection or (b)
13 consistent with Fed. R. Civ. P. 30(c)(2), instruct the witness not to answer questions concerning
14 the document pending a prompt resolution of any disagreement concerning the document's
15 privileged or work-product protected status. If the party allows the examination concerning the
16 document to proceed on a non-waiver basis, the parties shall sequester all copies of the
17 purportedly-privileged or work-product protected document. Immediately following the
18 deposition, the parties will commence the procedure outlined in paragraph 16 above to address
19 the claim of privilege or other protection. Until the dispute is resolved, all parties shall treat the
20 transcript of such deposition as "Confidential." If the party instructs the witness not to answer
21 questions concerning the document, the parties will then cooperate in promptly submitting the
22 issue of the document's status to the Court for expedited resolution using the procedures set forth
23 in Local Rule 37(a)(1)(B). A party that halts a deposition on the basis of privilege that the Court
24 deems not to exist may bear the cost of completing the deposition.

25 18. This Order is without prejudice to the right of any party or non-party to seek relief
26 from the Court from any of the provisions contained here.

1 19. This Order shall not be construed as waiving any right to assert: a claim of
2 privilege; waivers of privilege for documents not produced under the procedure set forth above;
3 or waivers of privilege that occurred prior to documents exchanged under the procedures set forth
4 above; or for relevance, overbreadth, burdensomeness, or other grounds for not producing
5 material called for, and access to all material shall be only as provided by the discovery rules and
6 other applicable law.

7 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

8
9 DATED: February 28, 2019

LANE POWELL PC

11 By: /s/ Mark G. Beard

12 Mark G. Beard
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Attorneys for Plaintiff King County

19
20 DATED: February 28, 2019

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Attorneys for Plaintiff King County

1 DATED: February 28, 2019

COZEN O'CONNOR

2
3 /s/ William F. Knowles

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10 Attorneys for Defendant ACE American Insurance Co.

11 PURSUANT TO STIPULATION, IT IS SO ORDERED

12 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
13 documents in this proceeding shall not, for the purposes of this proceeding or any other federal
14 or state proceeding, constitute a waiver by the producing party of any privilege applicable to
15 those documents, including the attorney-client privilege, attorney work-product protection, or
16 any other privilege or protection recognized by law.

17 DATED this 1st day of March 2019.

18 

19 RICARDO S. MARTINEZ

20 CHIEF UNITED STATES DISTRICT JUDGE

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of _____
4 _____ [print or type full address], declare under penalty of perjury that I have
5 read in its entirety and understand the Stipulated Protective Order that was issued by the United
6 States District Court for the Western District of Washington on [date] in the case of King County
7 v. ACE American Insurance Company, Case No. 2:18-cv-01886 RSM. I agree to comply with
8 and to be bound by all the terms of this Stipulated Protective Order and I understand and
9 acknowledge that failure to so comply could expose me to sanctions and punishment in the nature
10 of contempt. I solemnly promise that I will not disclose in any manner any information or item
11 that is subject to this Stipulated Protective Order to any person or entity except in strict
12 compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the
14 Western District of Washington for the purpose of enforcing the terms of this Stipulated
15 Protective Order, even if such enforcement proceedings occur after termination of this action.

16
17 Date: _____

18 City and State where sworn and signed: _____

19 Printed name: _____

20 Signature: _____
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